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DEPARTMENT FOR EAP/MTS, USTR
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SUBJECT: USTR PUSHES FOR PROGRESS ON IP PROTECTION

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SUMMARY

¶1. (SBU) In a visit to follow up on issues discussed under the U.S.-Brunei Trade and Investment Framework Agreement (TIFA) (ref A) USTR Director David Katz pressed Brunei to take more active measures against intellectual property rights violations. GoB officials welcomed USG training at ILEA and the U.S. Patent and Trademark Office's Global Intellectual Property Academy and asked for further capacity building training, particularly for law enforcement officers. Although still bitter about what they viewed as a lack of industry patience in a failed raid on IPR violators in December 2005 (ref B), Brunei police and prosecutors expressed a willingness to work with us and industry to improve enforcement efforts and adopt some U.S.-style legal measures in a new IPR law under development. Post has reached out to industry and regional USG experts to follow up on the GoB training requests. END SUMMARY.

Brunei Must Do More

¶2. (SBU) In a two-day visit August 31-September 1 to follow up on a broad range of issues raised at the 3RD U.S.-Brunei Trade and Investment Council meeting in May (ref A), USTR Director for Southeast Asia David Katz, accompanied by DCM, pressed a broad range of GoB officials to improve efforts to protect intellectual property. In meetings with officials from the Ministry of Foreign Affairs and Trade, Police, and Attorney General's Chambers, Katz emphasized that IP protection is not just about stopping optical disc (OD) piracy. A climate of lax IPR enforcement can lead to the proliferation of counterfeit medicines, food products and auto parts behind China's current trade troubles. These trade problems also have a direct, measurable impact on the health and safety of the public. Katz noted that Brunei was not currently on any of the Special 301 lists, but the GoB would need to take a more proactive stance on IPR protection to stay ahead of the curve.

¶3. (SBU) Katz and DCM also noted that as Brunei seeks to diversify its economy away from oil and gas, it will never be able to compete in low wage, high labor content industries in the ASEAN region and will have to focus on high value products. This will require good IPR enforcement not just for foreign IP rights holders, but also to ensure that IP developed by Brunei firms is protected. A good example of this is the investment the GoB is making to develop a

specific pathogen-free, jumbo-sized strain of Asian tiger prawn for export to the U.S. and other high-end markets. As the value of this product will be in its unique genetic make up, Brunei will have to ensure that this IP is protected from unlicensed use by lower-cost shrimp producing countries.

Scope of the Problem

¶4. (SBU) Brunei authorities acknowledge that despite their efforts to combat video piracy, counterfeit DVDs are routinely available in local stores. In a random sampling of video/music stores within two blocks of the embassy, DCM and Katz routinely found multiple copies of movies currently only in theatrical release - the Bourne Ultimatum, and Harry Potter and the Order of the Phoenix. These and other titles in regular DVD release are sold in hard-sided plastic packaging resembling legitimate DVDs, but the packages lack shrink wrap, holographic security stickers, or other authentication indicators and the cover art is easily recognizable as color Xeroxes of the original or photoshop combinations of movie poster art and DVD labeling information from North American or Asian DVDs.

¶5. (SBU) Brunei police have not found any illegal production facilities in Brunei and believe that most pirated optical discs are imported from Malaysia, Indonesia, and Hong Kong. Under current law and regulations, the Police asserted that customs officials are powerless to stop counterfeit goods if the importer has declared the goods on customs documentation and paid any fees or duties. Prosecutors told us that they were able to stop a shipment of the movie Batman Returns because the rights holder had provided an affidavit in advance that the importer did not have distribution rights in Brunei. In response to our questions, Brunei authorities said that they had no information that would indicate any organized crime involvement in the pirate OD or software trade. In fact, in past public education efforts, GoB officials came to believe that most retailers would prefer to sell legitimate ODs and software but

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are pulled into selling pirated goods because of competitive pressures.

¶6. (SBU) Microsoft's local representative told us that software piracy is rampant, but conducted on a small scale by local businesses. Customers can leaf through catalogues of software titles and have a disc burned on the spot with the titles they seek. We note that in the last year, DCM attempted to purchase Microsoft software for personal use and had to visit three different stores before finding a vendor with a legal copy in stock. All three stores openly offered to sell acknowledged illegal copies of the software in question.

GoB Wants Partnerships with Industry

¶7. (SBU) Police and prosecutors told us that their hands are tied by Brunei's current law which requires the copyright holder to file a complaint in order to initiate enforcement action. This requires close cooperation with rights-holders throughout the investigation and prosecution of suspected violations. GoB officials emphasized that their track record of working with rights holders has been mixed, but often negative. In a summary of IPR cases investigated by the police over the past 10 years, a significant number of investigations were dropped because the complainant either did not have or could not prove that they had distribution rights for Brunei for the articles in question (which were found to have been legitimate and legally imported) or the rights holder failed to respond to requests for documentation to bring a case to trial. According to this police data, Brunei successfully arrested, prosecuted and convicted 14 vendors in 1996 and one in 1997 for selling fake Levi's jeans. Vendors were also convicted in 2000 and 2003 for selling fake Hindu and Indonesian DVDs.

¶8. (SBU) In the December 2005 case of the failed raids conducted on behalf of the Motion Picture Association (ref B), the police officer

who ran the investigation was up front in admitting that mistakes were made on the Brunei side with the search warrant (part of the shop raided was located in an adjacent building not covered by the warrant, so the shop staff moved all the pirated material out of the covered location before police arrived). However, police and prosecutors were both adamant that if the MPA had shown more patience and stayed in Brunei longer, a follow up raid would have been conducted and likely have caught the offending materials.

¶19. (SBU) Despite this track record, GoB authorities were ready to work with rights holders to combat piracy under the current law. While they understood the cost-benefit trade off for the rights holders, they urged that rights holders establish a presence in Brunei either by opening an office or through regular visits. This was necessary to help rights holders understand how to work within the Brunei legal system and to build confidence on the Brunei side that the rights holder would follow up with required documentation to bring a case to trial to justify the investment in manpower to investigate and prosecute a violator.

Possible Law Improvements

¶11. (SBU) GoB officials across the board agreed that Brunei needs to strengthen its IPR protections. Katz suggested that granting police and customs officers ex officio authority to seize suspected materials and then follow up with rights holders to verify the authenticity of faked goods was an international best practice that Brunei should consider adopting. The Attorney General's Chambers (AGC) officials responded that they are in the process of drafting a Copyright Law to supersede the existing Copyright Order. The officer drafting the legislation told us that elements of U.S. model copyright and IPR protection guidelines are being considered for inclusion in the new law and associated procedural guidance. Work is expected to be completed on the draft by the end of the year. Katz suggested that the GoB provide a draft of the law for expert review by the USG. AGC officials welcomed the offer and would consider taking advantage of the expertise.

Need Capacity Building

¶12. (SBU) Police and prosecutors welcomed USG-supported IPR enforcement training they had received at the International Law Enforcement Academy (ILEA) in Bangkok and at the U.S. Patent and Trademark Office's Global Intellectual Property Academy (GIPA) in

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Virginia. All GoB officials we met with indicated that customs officials in particular, but police as well needed training in how to identify fraudulent goods. Such training, AGC officials explained, would ease concerns about wrongly identifying goods as counterfeit. This would be essential if the AGC were to take Katz's suggestion of using probable cause to justify seizing suspect goods absent a complaint from a rights holder under current law. However, GoB officials would also want to have built a relationship with the rights holder to ensure timely response to requests to authenticate suspect goods. AGC officials also indicated that training for judges would also be welcome.

¶13. (SBU) In response to these requests, post is working with regional industry representatives to find opportunities to restart their enforcement cooperation with the GoB. In addition, we are working with our regional USG law enforcement and IP protection officials to find additional training opportunities outside of regularly scheduled ILEA and GIPA courses.

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